RECORD
AND
BRIEFS

No. 10-1491

IN THE

Supreme Court of the United States

ESTHER KIOBEL, ET AL.,

Petitioners,

v.

ROYAL DUTCH PETROLEUM CO., ET AL.

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF FORMER STATE DEPARTMENT LEGAL ADVISERS AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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INTERESTS OF AMICI CURIAE[1]

Amici, who are listed in the Appendix, are former U.S. Department of State Legal Advisers who submit this brief in their personal capacities. As former Legal Advisers, Amici are knowledgeable in matters of international law and foreign policy and the role of the State Department. Congress created the Office of the Legal Adviser in 1931, see Act of Feb. 23, 1931, 46 Stat. 1214, to replace the Solicitor of the State Department. The Legal Adviser is one of 24 Assistant Secretaries authorized by 22 U.S.C. § 2651a. The State Department's Foreign Affairs Manual defines the responsibilities of the Legal Adviser to include advising and representing the Bureaus and missions of the Department, the Secretary and senior leadership and, through the Secretary, the Executive Branch "on all legal and legal policy issues arising in connection with U.S. foreign policy and the work of the Department." The Legal Adviser is the highest-ranking legal officer in the Executive Branch with specific responsibility on matters of international law.

Amici's submission of this brief is not intended as criticism of the State Department or the United States. Rather, its purpose is to provide context for the Court's question, including an explanation of the approach that the Department and the Legal Adviser historically have taken to issues of extraterritoriality in connection with the ATS and otherwise, to

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[1] No counsel for a party authored this brief in whole or part, nor did any person or entity, other than Amici or their counsel, make a monetary contribution to the preparation or submission of this brief. All counsel of record have consented to this filing through blanket consents filed with the Court.

comment on the state of ATS litigation, and to suggest to the Court an approach to improve that state and provide clarity to the meaning of the ATS and the role of the Executive Branch in ATS litigation.

SUMMARY OF ARGUMENT

Whether the ATS authorizes an action for conduct taking place solely within the territory of a foreign nation has been a matter of great interest to the United States and to the State Department because any extraterritorial application of U.S. law has significant foreign policy implications. Among other things, allowing the courts of one nation to adjudicate events occurring within the territory of a second nation under the rubric of international law may be perceived by that second nation as an infringement upon its sovereignty—particularly where, as often is the case in ATS suits, the action involves accusations of impropriety by the second nation's officials. The United States also has a strong reciprocal sovereign interest in avoiding a legal regime in which activities in its own territory or the activities of its own citizens, officials, or military personnel are subject to review by the courts of another nation having no connection with the activities. And U.S. foreign policy interests are served by a rule that any measures taken against foreign nations—such as economic sanctions or "constructive engagement"—should be decided upon and implemented by the political branches.

In recognition of these concerns, there has developed a well-established presumption against extraterritorial application of U.S. law that this Court consistently has applied. The presumption serves to avoid the foreign relations issues that would arise were U.S. courts, without clear authorization

from Congress, to project U.S. law into foreign territory and thus infringe upon the sovereignty of another nation. Consistent with these concerns, the United States has argued in a series of prior briefs that the presumption against extraterritoriality should apply fully to the ATS. This conclusion comports with the State Department's historical view of extraterritoriality and, relatedly, its cautious approach toward initiatives that would permit nations, including the United States, to reach beyond their territorial boundaries to regulate matters occurring within other nations. And in those prior briefs, the United States, consistent with this Court's precedents, rejected a "case-by-case" approach to extraterritoriality.

Also in recognition of these concerns, there exists a near-unanimous practice among nations of not permitting their courts to exercise universal *civil* jurisdiction over alleged extraterritorial human rights abuses to which the state has no connection. The sole, significant exception to this universal consensus against universal civil jurisdiction is the United States' court-sanctioned universal civil jurisdiction under the ATS and the Congressionally-sanctioned universal civil jurisdiction under the Torture Victim Protection Act of 1991 (TVPA), 28 U.S.C. § 1350, note. Amici believe that such a dramatic departure from a practice that clearly enjoys the status of customary international law should be decided through the political process, as in the case of the TVPA—not by the courts and particularly not on an *ad hoc* basis.

The Supplemental Brief filed by the United States in the present case departs from prior U.S. positions on these points. Although it argues against the

extraterritorial application of the ATS in this particular case, it urges the Court to announce an "all the facts and circumstances" test under which other facts could produce a different answer in another case. Supplemental Brief for the U.S. ("Supp. Br.") 4-5. Among the "facts and circumstances" that might justify a different result are the location and domicile of the defendant, the presence or absence of an objection from the Executive Branch or an affected foreign government to the extraterritorial application of the statute, and the foreign policy implications of adjudicating the case. *Id.* at 18-19.

This proposed "facts and circumstances" test is inconsistent with and inferior to the straightforward approach to extraterritoriality advocated by the United States in prior cases and consistently applied by this Court: namely a strong presumption against extraterritorial application that can be overcome only by a clear indication of legislative intent to extend the law to foreign territory. Amici believe that extraterritoriality is a legal question to be answered by reference to the text of the statute and applicable background rules of interpretation. It does not and should not turn on particular facts, such as who the defendant is, where the defendant can be found, whether the Executive Branch or a foreign government objects to the application of the statute in a given case, or whether the case challenges conduct of a foreign sovereign.

The judicial practice of seeking the State Department's case-specific views on the foreign policy implications of ATS litigation has a mixed record, which only would be exacerbated by a rule that courts should defer to the Executive Branch as part of a "facts and circumstances" test for determining the

extraterritoriality of the ATS. The record of experience with such case-specific requests shows that the Department's views may change from Administration to Administration or may not be expressed to the courts. Moreover, there may be changes in the views of the relevant foreign states that in turn may affect the position of the Department (which likely would have considered the foreign state's views in formulating its position). Finally, different courts have given differing weights to the Department's expression of its views in particular cases.

As a result, the judicial practice of requesting State Department views has come to resemble the unsatisfactory pattern that occurred in foreign sovereignty immunity cases, where the Department's different approaches in submitting its views and the courts' differing treatment of those views led to "sovereign immunity determinations [being] made in two different branches, subject to a variety of factors, sometimes including diplomatic considerations. Not surprisingly, the governing standards were neither clear nor uniformly applied." *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 488 (1983). This confusion led to Congress' enactment, with encouragement from the State Department and its Legal Adviser, of the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1602 (FSIA). The model of soliciting the United States' case-specific views is even less appropriate in deciding statutory interpretation issues such as extraterritoriality, because, unlike what might be argued with respect to immunity, the meaning of the statute should not change depending on the views of the Administration that is in place.

As for the specific question posed by the Court, Amici believe that the position advanced by the United States in prior cases is more faithful to the State Department's historical approach to such matters than is the Supplemental Brief. As the United States explained in the prior briefs, nothing in the text or the history of the ATS suggests that Congress meant to apply U.S. law incorporating the Law of Nations to activities occurring solely within foreign territory. Rather, both the text and history evince an intent to authorize suits for certain injuries to foreign citizens occurring *within the United States* in order to avoid friction between the then-fledgling Republic and other nations—a history that cuts strongly against extraterritorial application.

Amici therefore urge the Court to reject the "facts and circumstances" test for extraterritoriality urged in the United States' Supplemental Brief and to hold categorically that the ATS does not authorize suits for violations of the Law of Nations occurring solely within the territory of a foreign sovereign.

ARGUMENT

I. THE PRESUMPTION AGAINST EXTRATERRITORIALITY IS DESIGNED TO AVOID THE SIGNIFICANT FOREIGN RELATIONS CONCERNS THAT WOULD BE RAISED BY U.S. ATTEMPTS TO REGULATE CONDUCT WITHIN THE TERRITORY OF FOREIGN SOVEREIGNS.

This Court long has applied a presumption that United States law does not apply to events and conduct within the territory of foreign sovereigns unless there is a "clear indication" to the contrary

from Congress. See *Morrison* v. *Nat'l Australia Bank, Ltd.*, 130 S. Ct. 2869 (2010). This rule reflects both international law and domestic law concerns. At the international law level, the principle of territory has been described as "perhaps the fundamental concept of international law," because it gives meaning to the crucial concepts of sovereignty and jurisdiction. See O'Connell, 1 INTERNATIONAL LAW, 403 (1970). *Accord* Delbez, *Du Territoire dans ses Rapports avec L'État*, 39 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 46 (1932); MacMillan, *Compania Naveria Vascongado* v. *Cristina SS*, [1938] AC 485 (U.K.) 496-97. As Chief Justice John Jay explained, the idea that "every nation is, and ought to be, perfectly and absolutely sovereign within its own dominions to the entire exclusion of all foreign power, interference and jurisdiction" formed the core of international relations before our nation was founded, and long has been ingrained in our jurisprudence. *Henfield's Case*, 11 F. Cas. 1099 (C.C.D. Pa. 1793) (No. 6,360) (charge given to grand jury on circuit); *accord The Schooner Exchange* v. *McFaddon*, 7 Cranch (11 U.S.) 116, 136 (1812) ("[t]he jurisdiction of the nation within its own territory is necessarily exclusive and absolute").

At the domestic level, the presumption against extraterritoriality helps to manage the significant foreign policy concerns that can be raised by applying U.S. law to conduct occurring in foreign territory. This Court has stated that the presumption is "grounded in significant part on the concern that projecting U.S. law into foreign countries 'could result in international discord.'" *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991). The presumption minimizes friction with other nations by establishing

a clear rule under which U.S. law will not be employed to regulate conduct in other nations unless Congress explicitly so states in a manner visible to courts, litigants, and other nations that might have a reason to object. See generally *F. Hoffman-La Roche Ltd.* v. *Empagran S.A.*, 542 U.S. 155, 164-65 (2004).

II. THE UNITED STATES HISTORICALLY HAS BEEN CAUTIOUS ABOUT THE USE OF THE ATS TO ADJUDICATE MATTERS OCCURRING ABROAD.

The United States historically has either questioned or openly opposed the use of the ATS as a means of adjudicating in U.S. courts disputes occurring entirely within the territory of other nations.

The United States' historical position on the extra-territoriality of the ATS is to be contrasted with its historical approach to the *substance* of the international law principle being asserted. In some cases, the United States has endorsed the advancement of new norms of international law to take account of changing views, including the perspectives offered by World War II. In others, it has resisted the use of the ATS to effect any such evolution, asserting that any substantive innovation should come from Congress. But the United States consistently has viewed as separate questions what the *substance* of international law should be and whether the United States can or should impose its views of international law extraterritorially through the ATS.

Perhaps the best example of this distinction between the substance of international law and the

extraterritorial enforcement of U.S. law incorporating international law is the United States' position on the International Covenant on Civil and Political Rights (Covenant). The U. S. ratified the Covenant in 1992, thus codifying as international law the principles embodied therein, whether or not they previously had been considered customary international law. When it came to enforcement, however, the United States took the position, which it maintains today, that it would not enforce the Covenant with respect to conduct outside the United States.[2] See Summary Record of the 1405th meeting: U.S. of Am., UN

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[2] Enforcement of an ATS claim based on violations of the Covenant within the territory of another State Party would be inconsistent with this position, as well as with the declaration by the United States (and endorsed in the Senate's Resolution on Advice and Consent to Ratification, 138 Cong. Rec. 8070 (1992), art. III(1)) that those articles are not self-executing. As noted in *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 728 (2004), the declaration represents one instance in which "the Senate has expressly declined to give the federal courts the task of interpreting and applying international human rights law." The Court stated that, although the Covenant binds the U.S. as a matter of international law," its ratification based on "the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal courts" meant that the plaintiff could not argue that the Covenant itself "establish[es] the relevant and applicable rule of international law" but instead would have to "attemp[t] to show that prohibition of arbitrary arrest has attained the status of binding customary international law"—an undertaking that the Court found the plaintiff had not met. *Id.* at 735. Although not the main point of *Amici*'s brief, *Amici* interpret *Sosa* to require a plaintiff to show, without invoking the Covenant to establish the "relevant and applicable rule of international law," that those rules have "attained the status of binding customary international law." *Id.*

ESCOR Hum. Rts. Comm., 53rd Sess., 1405th mtg. at ¶¶ 7, 20, U.N. Doc. CCPR/C/SR 1405 (Apr. 24, 1995) (statement of Legal Adviser Conrad Harper) (language of Covenant confirmed that the United States' enforcement obligations were restricted "to persons under United States jurisdiction and within United States territory").

A. The United States' Early Briefs on the ATS Encouraged Advancements in the Substance of International Law, But Expressed a More Reserved Position With Respect to the Adjudication of Extraterritorial Claims in U.S. Courts.

The first significant modern case to address the ATS was *Filártiga* v. *Peña-Irala*, 630 F.2d 876 (CA2 1980). The United States submitted a brief, joined by the Legal Adviser (Roberts B. Owen), strongly supporting the view that each nation owes obligations under international human rights law to its own citizens—a view that ran counter to then-current Circuit law. See Mem. for the U.S. as Amicus Curiae, CA2 No. 79-6090 (June 6, 1980) ("*Filártiga* Br.") at 3-17. In particular, the United States argued that international law had evolved to encompass the prohibition of official torture as a new international law norm. *Id.* The United States' groundbreaking brief thus strongly supported a formal recognition that the *substance* of international law was not static but now encompassed an important new human rights norm. The United States went so far as to assert, after detailing the widespread recognition in international law sources of the prohibition against official torture, and the evolving recognition of the rights of individuals to invoke international law, that a refusal to allow for private enforcement of the right

to be free from torture could "seriously damage the credibility of our nation's commitment to the protection of human rights." *Id.* at 20.[3]

But the United States was more circumspect with respect to the extraterritorial aspects of the case. After observing that some ATS suits might challenge the conduct of foreign officials, it specifically noted that the propriety of suits based wholly upon extraterritorial conduct was not before the Court. It observed that the issue of *forum non conveniens* had been raised in the proceedings below, but that the only question presented on appeal was "whether official torture is a tort ... committed in violation of the law of nations" such that it could be redressed judicially as a matter of international law. *Filártiga* Br. at 22 & n.48. The United States made clear that it was *not* addressing the proper forum in which such a tort should be redressed and urged that that question "be addressed by the district court first." *Id.* In so doing, it emphasized the extraterritorial nature of the case and observed that "abstention is generally appropriate ... when the parties and the conduct alleged in the complaint have as little contact with the United States as they have here." *Id.* n.48.

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[3] In its Supplemental Brief, the United States suggests that this statement in the *Filártiga* brief about a loss of U.S. credibility reflected a specific endorsement of the view that the ATS applies extraterritorially. Supp. Br. 19-20. But as noted in the text, the *Filártiga* brief merely noted that in light of the evolving *substance* of international law concerning torture, a refusal to recognize any remedy for torture might damage U.S. credibility, and it expressed substantial doubt that the U.S. was an appropriate forum for the suit. The *Filártiga* brief did not reach or endorse the conclusion that the ATS applies to exterritorial conduct.

The United States took a similar approach in *Kadic* v. *Karadžić*, 70 F.3d 232 (CA2 1995), where it endorsed the recognition of changes in the substance of international law, while expressing reservations about whether U.S. courts should adjudicate claims arising from conduct taking place abroad. In an amicus brief, again joined by the Legal Adviser (Conrad K. Harper), the United States forcefully argued that international law no longer should be read to require state action for the imposition of liability for certain human rights violations. Statement of Interest for the U.S., CA2 Nos. 94-9035 & 94-9069 (Sept. 13, 1995) at 5-11. The United States noted that it had asserted the same substantive law point to the International Criminal Tribunal for the Former Yugoslavia in connection with its indictment of Karadžić and others for the same crimes. *Id.* at 7-8. But on the issue of the foreign locus of the challenged conduct, the United States' brief stressed the "general importance" of considering the *forum non conveniens* doctrine in "cases such as these where the parties and the conduct alleged in the complaints have as little contact with the United States as they have here," and urging that that question be addressed by the district court. *Id.* at 18.

B. In More Recent ATS Briefs, the United States Has Stated an Unqualified Position Against Extraterritorial Application of the ATS.

In a more recent series of cases, the United States has expressed the view more definitively that the ATS does not apply to conduct occurring solely within a foreign nation. In an amicus brief to the Second Circuit, signed by the Legal Adviser (John B.

Bellinger III), the United States stated without qualification that the ATS "does not apply to extra-territorial claims." Brief for the U.S. as Amicus Curiae in *Presbyterian Church of Sudan* v. *Talisman Energy Inc.*, CA2 No. 07-0016 (May 15, 2007). Although noting that the United States had strongly condemned, through diplomatic channels, the conduct challenged in that case—serious human rights violations by the government of Sudan against its own citizens—the United States made clear that claims arising from that misconduct were not cognizable under the ATS because the misconduct took place on foreign soil. *Id.* at 4. The United States applied the presumption against extraterritoriality and carefully analyzed the history of the ATS, which demonstrates Congress' concern with providing a remedy for domestic wrongs. *Id.* at 8-12. The United States also noted that the rationale underlying the presumption applies fully to the ATS, which, if extended to extraterritorial conduct, could seriously interfere with a foreign sovereign's efforts to resolve conflicts within its own territory. *Id.* at 9. The United States observed that "[i]t is precisely to avoid 'unintended clashes' with such efforts that the Supreme Court requires Congress to speak clearly when it intends for legislation to apply extra-territorially." *Id.* at 10.

The United States has reiterated this view in a series of other cases where the alleged conduct occurred entirely within foreign territory, including several cases involving U.S. defendants. In so doing, it consistently has concluded that the text and history of the statute indicate an intent to address domestic events. See Brief for the U.S. as Amicus Curiae in *Mujica* v. *Occidental Petroleum Corp.*, CA9 Nos. 05-

56175, 05-56178 & 05-56056 (Mar. 2006) at 17-20; Brief for the U.S. as Amicus Curiae in *Khulumani* v. *Barclay Nat'l. Bank Ltd.*, CA2 Nos. 05-2141 & 05-2326 (Oct. 14, 2005) at 5-8. In addition to offering its legal views, the U.S. has observed that the cause of international human rights is better advanced by encouraging nations to address the issues within their own legal systems than bringing them to task on United States terms in United States courts. Brief for the U.S., *Mujica* 18-20. The United States reiterated these points to this Court in the South African Apartheid Litigation, styled as *American Isuzu Motors, Inc.* v. *Ntsebeza, affirmed for lack of quorum*, 553 U.S. 1028 (2008) ("*American Isuzu* Br.") (generally, the "Apartheid Litigation"). See Brief for the U.S., No. 07-919 (Feb. 11, 2008) 19-20, discussed below. And in *Sosa*, in a brief joined by the Legal Adviser (William H. Taft, IV), the United States described as "seriously mistaken" the suggestion that the ATS reaches torts committed "against an alien anywhere in the world." Brief for the U.S., No. 03-339 (Jan. 2004) at 46. It noted that the presumption against extraterritoriality derives, in significant part, from the need to "'protect against unintended clashes between our laws and those of other nations which could result in international discord.'" *Id.* at 47, quoting *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. at 248.

The Apartheid Litigation illustrates both the United States' unqualified position on extra-territoriality, and the judicial confusion and the foreign relations friction that would result from a case-by-case approach administered by the U.S. district courts. The Apartheid Litigation combined several ATS class actions "against a slew of

multinational corporations," including U.S. corporations, that did business in South Africa. *In re South African Apartheid Litig.*, 346 F. Supp. 2d 538, 542, 548 (SDNY 2004), *vacated in part*, *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254 (CA2 2007). The theory was that the defendants aided and abetted the apartheid regime by supplying "resources, such as technology, money, and oil to the South African government" and by complying with South African law, which allegedly required them to maintain military-style security in a manner that perpetuated apartheid. *Id.* at 544-45.

During the seven years in which motions to dismiss were pending, the litigation strained relations between the U.S. and the democratically-elected post-apartheid South African government. That government objected that the litigation infringed upon its sovereign right to address the legacy of apartheid through its own processes, which emphasized reconciliation and economic development instead of retribution and damages. See Brief of Amicus Curiae Rep. of South Africa in *Khulumani*, CA2 No. 05-2141 (Oct. 14, 2005) at 1-2.

The United States submitted briefs in the district court, in the Second Circuit, and in this Court, all signed by the Legal Adviser (John B. Bellinger III), reiterating its unqualified view that the ATS does not apply extraterritorially and supporting South Africa's diplomatic objections. See *American Isuzu* Br. at 19-20. As the United States explained, "[e]ven when the government whose acts are under scrutiny has been removed from power, a suit brought in United States court to redress those wrongs ... will often be viewed by the foreign state's new government as an infringement on its sovereignty." *Id.* at 19.

Moreover, the United States noted, the litigation would "have a deterrent effect on the free flow of trade and investment, because it would create uncertainty for those operating in countries where abuses might occur." *Id.* at 20; see also *Khulumani*, 504 F.3d at 297 (Korman, J., concurring in part and dissenting in part, quoting Legal Adviser's concern that adjudication in U.S. courts would "imped[e] South Africa's ongoing efforts at ... equitable economic growth" and so be "detrimental to U.S. foreign policy interests in promoting sustained economic growth in South Africa"); *In re: South African Apartheid Litig.*, 617 F. Supp. 2d 228, 276-77 (SDNY 2009) (citing U.S. Statement of Interest submitted to district court).

But, despite the Executive Branch's objections that the litigation compromised South Africa's sovereignty and its policy of reconciliation instead of retribution, the district court disagreed, concluding that, in its view, there was no conflict between the litigation and South Africa's reconciliation policy and the United States' view was entitled to no deference. See 617 F. Supp. 2d at 285-86. Accordingly, the U.S. had what amounted to two foreign policies—one announced by the Executive Branch, the other by a federal district court in a private litigation. This undesirable state of affairs is an inevitable consequence of relying on a court's case-by-case consideration of the State Department's views on a particular dispute.

C. With Regard to Extraterritoriality Generally, the United States Consistently Has Advocated a Categorical Approach.

The United States' unqualified approach in prior briefs toward the extraterritoriality of the ATS is consistent with its historical position on extraterritoriality more generally, in the context of both substantive and "jurisdictional" enactments. The United States consistently has advocated a categorical application of the presumption against extraterritoriality—that is, an application that addresses the issue with respect to the statute as a whole—and has opposed proposals to address extraterritoriality on a "case-by-case" basis.

In *Vermilya-Brown Co.* v. *Connell*, 335 U.S. 337 (1948), for example, the United States urged this Court to hold categorically that the Fair Labor Standards Act did not apply to Americans on overseas military bases, invoking the rule that "all legislation is prima facie territorial" and that "the legislation of the Congress, unless the contrary intent appears, is construed to apply only within the territorial jurisdiction of the United States." Brief for the U.S. as Amicus Curiae, O.T. 1948, No. 22 (Oct. 8, 1948) at 43. The United States reaffirmed this view the following year, Brief for the Petitioner in *U.S.* v. *Spelar*, O.T. 1949, No. 22 (Aug. 22, 1949) at 42-43, and in a labor relations case a decade later, Brief for the U.S. as Amicus Curiae in *Incres S.S. Co.* v. *Int'l Maritime Workers Union.*, O.T. 1962, Nos. 33, 91, 93, 107 (Nov. 9, 1962) at 60. And although the Court did occasionally find a Congressional intent to extend U.S. law extraterritorially, as in *Vermilya Brown*, it emphasized, consistent with the United States' then

position, that it was a "matter of statutory interpretation as to whether or not statutes are effective beyond the limits of national sovereignty." 335 U.S. at 339-40.

More recently, in *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555 (1992), the United States invoked the presumption as applied to the Endangered Species Act, Brief for the U.S., No. 90-1424 (July 12, 1991) at 35-36. Its view was that the phrase "any action"—which parallels the phrase "any civil action" in the ATS—was insufficiently specific to extend coverage to actions in foreign countries. *Id.* The United States noted the importance of a categorical "clear statement" rule to ensure that Congress did indeed intend to extend U.S. law extraterritorially—an act that is "particularly sensitive" to foreign nations. Such a rule, it explained, "'assures that the legislature has in fact faced' and is prepared to accept the potential consequences" of extraterritorial application of a statute. *Id.* at 33. Although the Court concluded that the plaintiff lacked standing and thus did not reach the extraterritoriality issue, Justice Stevens concurred with the United States' view. 504 U.S. at 585-89.

Similarly, in *Smith* v. *United States*, 507 U.S. 197 (1993), a case involving the extraterritorial application of the Federal Tort Claims Act, the United States opposed a "case-by-case" approach to the question:

> [P]etitioner errs in implicitly assuming that the applicability of the presumption against extraterritoriality is to be determined on a case-by-case basis by looking to whether the reasons for application of the presumption are implicated in each particular instance. The purpose of the presumption would be vitiated if

> its application were subject to the type of ad hoc judicial balancing urged by petitioner; as with all canons of statutory construction, the usefulness of the presumption against extra-territoriality lies precisely in its general applicability, which is based on the understanding that Congress legislates against the backdrop of the presumption and will make its preferences known when it wishes to achieve a different result.

Brief for the U.S., No. 91-1538 (Sept. 4, 1992) at 22. This Court agreed. 507 U.S. at 203-05.

The United States adopted the same approach in *Rasul* v. *Bush*, 542 U.S. 466 (2004), a case involving a jurisdictional statute, arguing that "jurisdictional statutes are subject to the same presumption against extraterritoriality as other statutes." Br. for the Respondents, Nos. 03-334 & 03-343 at 28 n.11. And this Court did not hold otherwise, instead expressly recognizing the presumption but holding it inapplicable because the case arose within the "territorial jurisdiction" of the United States. 542 U.S. at 480-81.

III. THE UNITED STATES' PRIOR APPROACH IS MORE FAITHFUL TO U.S. FOREIGN POLICY OBJECTIVES AND THIS COURT'S PRECEDENT THAN ITS PROPOSAL FOR "CASE-BY-CASE" DEFERENCE TO THE STATE DEPARTMENT.

The Supplemental Brief filed by the United States in the present case retreats from prior U.S. views on extraterritoriality, both in the context of the ATS and

more generally.[4] The United States acknowledges that it previously advocated a "categorical" rule against the extraterritoriality of the ATS before this Court and the courts of appeal, but it now contends that the Court should *not* "articulate a categorical rule." Supp. Br. 21-22 n.11. Thus, although the United States urges the Court not to apply the ATS extraterritorially in the present case, it asks the Court to announce a test that would not resolve the legal issue "across the board" but would leave open the possibility that the ATS would apply extraterritorially under other "facts and circumstances." *Id.* at 4-6. This proposed case-by-case inquiry would be carried out by the lower courts based upon "an assessment of a variety of factors" and would "not necessarily lead to one uniform conclusion." *Id.* at 6.

The Supplemental Brief offers no definitive set of factors or specific test to guide the lower courts in deciding the extraterritoriality question. It suggests, for example, that in a future case it might make a difference if the defendant is either a U.S. corporation or a foreign individual present in the United States, or if the action does not accuse a foreign sovereign of wrongdoing, or if there are other "facts and circum-

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[4] The Supplemental Brief is not joined by the present Legal Adviser and does not otherwise indicate the State Department's view as to the presumption against extraterritoriality generally, or its particular application to the ATS or even to the facts of the present case. The only hint comes in a cryptic statement that the Office of the Solicitor General "is informed by the Department of State that, in its view, after weighing the various considerations, allowing suits based on conduct occurring in a foreign country in the circumstances presented in *Filártiga* is consistent with the foreign relations interests of the United States." Supp. Br. 4-5.

stances" that might suggest to other nations that the United States is "harboring" international criminals. Supp. Br. 18-19. It also suggests that, in any particular case, the outcome might be affected by the presence or absence of objection from the Executive Branch or an affected foreign government to the extraterritorial application of the statute in that case. *Id.* at 17-18. Finally, it suggests that the district court should undertake an inquiry in each case as to whether the foreign policy objectives underlying the presumption against extraterritoriality—including avoidance of interference with the territorial sovereignty of other nations—would be furthered by the presumption. *Id.* at 15-17.

The Supplemental Brief's approach to the extraterritoriality question framed by the Court differs in several respects from the positions the United States has advanced in prior cases—most notably in its suggestion of a "facts and circumstances" test for deciding the question. As noted above, in prior cases, the United States has treated extraterritoriality as a question of law, to be decided based upon the text of the statute and any relevant objective indicia of Congress's intent, including the background and history against which the ATS was enacted. In none of its prior briefs did the United States suggest that the extraterritoriality analysis might come out differently depending on the facts of the specific case, such as whether adjudicating the case would raise foreign policy concerns, or whether the Executive Branch or the affected foreign nation objected to the suit. Certainly, the United States did not suggest that extraterritoriality was an issue to be decided by allowing the district court to weigh a list of factors

and determine the extraterritorial application of U.S. law on a case-by-case basis.

For the reasons that follow, Amici believe that the approach advanced by the United States in earlier cases best implements this Court's extraterritoriality precedents and the foreign relations concerns that historically have guided the United States in addressing such matters.

A. The "Categorical" Approach to the Extraterritorial Application of the ATS Comports With This Court's Precedents.

The "categorical" approach to extraterritoriality advocated by the United States in prior ATS cases—that is, an approach that addresses the statute as a whole and not on a "case-by-case" basis—is consistent with this Court's precedents. Most recently, in *Morrison*, this Court made clear that whether a statute applies extraterritorially is a question of law, not one to be decided on an *ad hoc* basis based on the facts and circumstances of a specific case. In holding that Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), does not apply extraterritorially, the Court rejected a "collection of tests" that the lower courts had developed, based largely on policy considerations, for "divining congressional intent" on the issue. The Court found such tests to be inappropriately "complex in formulation and unpredictable in application." *Morrison*, 130 S. Ct. at 2878. The Court held that, "[r]ather than guess anew in each case," the presumption against extraterritoriality applies "in *all* cases, preserving a stable background against which Congress can legislate with predictable effects." *Id.* at 2881.

The United States' application of this presumption in its prior ATS briefs comports more closely with *Morrison* than does the Supplemental Brief, and also is more faithful to *Sosa*. Under *Morrison*, the presumption applies unless Congress has given a "clear indication" that federal courts are authorized to project U.S. law onto foreign soil. 130 S. Ct. at 2878. Congress did not do that in the ATS, either as a general matter or by way of delegating the issue to the federal courts or the State Department to be determined based upon the "facts and circumstances." On the contrary, as the United States has demonstrated cogently in its prior briefs, the history and purpose of the ATS demonstrate that it was intended to avoid international conflict that could arise from a lack of a federal remedy for certain mistreatments of foreign citizens *within the United States*. That history confirms that the motivation behind the ATS was to provide a forum to fulfill our nation's international responsibilities based on domestic conduct, not foreign conduct. See generally *Sosa*, 542 U.S. at 715-17. The history gives no indication that Congress intended federal courts, through the vehicle of private lawsuits, to regulate conduct against aliens taking place in other countries. *Id.* Indeed, any such extension of one nation's law would have contravened the established principle of eighteenth century international law, discussed above, that a nation may not interfere through juridical actions based on conduct within another nation's territory.

As the Supplemental Brief agrees, the extraterritoriality issue does not turn on whether the law to be exported is based upon a statute or on federal common law. See Supp. Br. 3, 15-16. Nor does it matter that Congress has the power to regulate the

conduct of United States citizens abroad—as it has done in some instances, such as in the Foreign Corrupt Practices Act, see 15 U.S.C. § 78dd-1, et seq. Unless Congress actually has exercised that power, there is no authority for courts to read the statute to apply extraterritorially only as to U.S. nationals, as the Supplemental Brief seems to suggest. In *Foley Brothers, Inc.* v. *Filardo*, 336 U.S. 281 (1949), for example, the Court declined to read such a distinction into the Eight Hour Law, although it was conceded that Congress would have had the power to extend the law to United States companies employing American citizens overseas. *Id.* at 284-85, 286. *Accord EEOC* v. *Arabian-Am. Oil*, 499 U.S. at 248. Certainly, the foreign sovereignty concerns that are raised when events on foreign soil are adjudicated in U.S. courts do not depend on the nationality of a particular corporate defendant—as was the case in the Apartheid litigation, where the defendants included both U.S. and non-U.S./non-South African corporations. Here, nothing in the text of the ATS discloses an intention by Congress to distinguish, with respect to defendants, between U.S. and foreign nationals.

The Supplemental Brief suggests that this Court in *Sosa* endorsed a case-by-case approach to the extra-territoriality of the ATS. Specifically, it suggests that the Court's listing of reasons for "judicial caution" in the creation of new common law causes of action under the ATS, see *Sosa*, 542 U.S. at 725-28, means that the extraterritorial application of the ATS should be addressed by district courts using those reasons as factors to be considered on a case-by-case basis—to determine, for example, whether concerns of foreign policy implications or judicial overreaching

are implicated in a given case. Supp. Br. 3-4, 16. It also suggests that the same test for determining whether the ATS authorizes a substantive cause of action based upon a new international law norm should govern the extraterritoriality inquiry as well. *Id.* at 3-5. But the Court in *Sosa* did not decide the extraterritoriality question—instead resolving the case based upon the absence of a recognizable substantive law norm—and nothing in its opinion can be read to have addressed the issue or to have undermined the force of this Court's prior precedents imposing a categorical rule for extraterritoriality.[5]

Nor does the rationale of *Sosa* support the United States' approach. In *Sosa*, the "reasons ... for judicial caution" that the Court identified included, as the Supplemental Brief recites, "the modern conception of the common law; evolution in the understanding of the proper role of federal courts in making that law; the general assumption that the creation of private rights of action is 'better left to legislative judgment,' including the decision whether 'to permit enforcement without the check imposed by prosecutorial discretion'; 'the potential implications for the foreign

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[5] The Supplemental Brief mischaracterizes *Sosa* by quoting the Court's opinion for the proposition that, in enacting the TVPA, Congress "'expressed no disagreement' with the view that some extraterritorial causes of action may be recognized under the ATS." Supp. Br. 10 (*quoting Sosa*, 542 U.S. at 731). But the context of the quoted language makes plain that the Court was referring to its *substantive* test for recognizing new international law norms, not to any proposed extraterritorial application of the ATS by United States courts. And as the Supplemental Brief acknowledges, *id.* at 12, this Court in *Sosa* did not address the extraterritoriality question, instead resolving the case based on the lack of any cognizable substantive norm.

relations of the United States'; concerns about 'impinging on the discretion of the legislative and executive branches in managing foreign affairs'; and the absence of a congressional mandate." Supp. Br. 3-4, quoting *Sosa*, 542 U.S. at 725-28. But the Court nowhere indicated that these "reasons" were to serve as a set of factors to be balanced or weighed in evaluating whether the ATS applies extra-territorially. If anything, the Court's analysis suggests that these reasons counsel against such judicial balancing, even as to the substance of international law—a reading confirmed by the cautious formulation that the Court ultimately announced to address that question: "[F]ederal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted." 542 U.S. at 732; see also *id.* at 728 ("These reasons argue for great caution in adapting the law of nations to private rights.") Certainly, the Court's listing of reasons for judicial caution was not meant to become a set of factors in a balancing test for extraterritoriality—a purely legal question that, as noted, was not decided in *Sosa*.

B. The Categorical Approach Best Addresses the Relevant Foreign Policy and Practical Concerns Raised by ATS Litigation.

The categorical, or statute-specific, approach to extraterritoriality embodied in this Court's precedents also best addresses the foreign policy concerns raised by any proposed extraterritorial application of U.S. law—concerns that have animated

the United States' position in prior briefs. As the Supplemental Brief notes, the presumption against extraterritoriality is "grounded in significant part on the concern that projecting U.S. law into foreign countries 'could result in international discord.'" Supp. Br. 16, quoting *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. at 248. The presumption—and the categorical rule it produces—are critical means of avoiding friction with other nations by making clear that U.S. law will not be applied to regulate conduct in other nations unless Congress explicitly so states in a manner visible to courts, litigants, and other nations that might have a reason to object. See generally *F. Hoffman-La Roche*, 542 U.S. at 164-65.

The categorical view also furthers the reciprocity concerns that have guided U.S. foreign policy in the complex area of international human rights. The United States long has been an important proponent of human rights around the world, and on many occasions has advocated formal recognition of human rights through international instruments. But at the same time the United States, cognizant of its responsibilities as a major world power, has been unwilling to accept any rule of law that would allow U.S. citizens and military personnel to have their actions challenged in foreign courts having little or no connection to the events. An example is the United States' strong objections—consistent across multiple administrations—when efforts were made in Belgium, Spain, Germany, and France to employ the criminal law concept of "universal jurisdiction" to charge officials of the United States and its allies with alleged human rights crimes.[6] Similar

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[6] See generally Baker, *Universal Jurisdiction & the Case of Belgium: A Critical Assessment*, 16 ILSA J. INT'L & COMP. L. 141

reciprocity concerns have guided the United States' approach to the extraterritoriality of U.S. law and the exercise of anything resembling universal jurisdiction by U.S. courts. Simply put, it is not in the United States' interest to further a regime in which the question of extraterritorial application of a nation's laws is left to be decided on a case-by-case basis by that nation's courts or its executive. If U.S. district courts may decide on their own whether to project federal common law onto foreign soil by operation of the ATS, the United States will be impaired in its ability to object to similar efforts in the courts of other nations to challenge U.S. actions at home or abroad.

The case-by-case approach advocated by the Supplemental Brief also would make it difficult or impossible for foreign nations to know whether U.S. law will apply to conduct within their respective territories. To the extent that the approach would take into account various case-specific factors such as the choice of defendant (domestic or foreign), the nation in which the conduct occurred would have no way of knowing or controlling whether or when its sovereignty would be compromised. And to the extent that the outcome would turn on the views of the U.S. Executive Branch or those of the foreign sovereign itself, the test is unworkable because, among other things, experience has shown that those

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2009-10; de la Rasilla del Moral, *The Swan Song of Universal Jurisdiction in Spain*, 9 INT'L CRIM. L. REV. 777 (2009). See also Langer, *The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes*, 105 AM. J. INT'L LAW 1, 11, 29-32 (2011) (Belgium); *id.* 39-40 (Spain); *id.* at 11, 19-20 (Germany).

views likely would change from one administration or government to the next.

Finally, it is important as a practical matter for this Court to settle the question of the extraterritorial application of the ATS categorically. Given the prolonged uncertainty in the lower courts over the application of the ATS to overseas activities—including the many complex sub-issues that such cases present—this Court should decide, once and for all, whether the ATS applies to the many suits filed since *Filártiga*, nearly all of which arise from conduct occurring solely within the territory of foreign nations. Unlike the inconsistent applications to be expected by applying the "facts and circumstances" test, a categorical decision will bring predictability to this unsettled area of the law, helping the United States to maintain stable and predictable relations with other countries. It also will provide essential guidance to the lower courts. See generally *Hoffman-La Roche*, 542 U.S. at 168-69 (rejecting case-by-case approach to application of the Foreign Trade Antitrust Improvement Act "as too complex to prove workable"); *Lockheed* v. *Spink*, 517 U.S. 882, 895 (1996) (rejecting case-by-case approach to interpretation of ERISA in favor of a categorical reading that could provide "guidance to lower courts and those who must comply with ERISA"); *Lonchar* v. *Thomas*, 517 U.S. 314, 324 (1996) (noting need for clear rules to "guide the lower courts[,] reduce uncertainty, avoid unfair surprise, minimize disparate treatment of similar cases, and thereby help all litigants"). And, of course, Congress can amend the ATS if it concludes that extending

jurisdiction extraterritorially for such suits or some subcategory of them is warranted.[7]

C. The Practice of Consulting the State Department as to Whether Specific Litigation Matters Should Go Forward Has Not Worked Well In the Other Contexts Where it Has Been Employed.

The suggestion in the Supplemental Brief that courts should consider the State Department's views in deciding whether and when U.S. law applies extraterritorially calls to mind practices courts have used in other contexts to consult the Department on foreign policy issues that might be raised by adjudicating specific claims or cases. But this historical practice of relying upon State Department input has not proved workable even in the contexts in which it has been used, and it should not be extended to the quintessentially legal question of whether a statute should apply extraterritorially.

The experience of foreign sovereign immunity is illustrative. Before the passage of the FSIA, courts relied on case-by-case guidance from the State Department "on whether to take jurisdiction over actions against foreign sovereigns and their instrumentalities." *Verlinden*, 461 U.S. at 486. Beginning in the 1950s with the so-called "Tate

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[7] As the Supplemental Brief notes, Congress already did so to a limited extent in the TVPA, in which it "created an express statutory private right of action for claims of torture and extrajudicial killing under color of foreign law—the conduct at issue in *Filártiga*." Supp. Br. 4. For that reason, construing the ATS categorically in the manner proposed in the text would not undo the result in *Filártiga*.

Letter," the Department favored a "restrictive" theory of sovereign immunity, protecting the sovereign only for public and not commercial acts. *Id.* at 487. This restrictive theory—and the courts' practice of deferring to the Department's views on whether it should apply in specific cases—"proved troublesome" because foreign governments "often placed diplomatic pressure on the State Department in seeking immunity," leading to "suggestions of immunity in cases where immunity would not have been available under the restrictive theory." *Id.* Moreover, sometimes foreign nations would not seek State Department intervention, leaving the courts to decide whether immunity applied by reference to State Department positions in prior analogous cases. *Id.* Consequently, and "[n]ot surprisingly, the governing standards were neither clear nor uniformly applied." *Id.* at 488. At the strong recommendation of the Department and its Legal Adviser (Monroe Leigh), Congress passed the FSIA "to free the Government from case-by-case diplomatic pressures, to clarify the governing standards, and to 'assure litigants that decisions are made on purely legal grounds and under procedures that insure due process.'" *Id.* at 488 (quoting H.R. Rep. No. 94-1487, p.7 (1976)) (alterations omitted); see also *id.* at 487 n.10, citing Testimony of Monroe Leigh, Legal Adviser, Department of State, Hearings on H.R. 11315 before the Subcommittee on Administrative Law & Governmental Relations of the House Committee on the Judiciary, 94th Cong., 2d Sess., 34-35 (1976).

A similar pattern occurred with the act of state doctrine. For years, the courts employed the "Bernstein exception" to the doctrine—so named after the Second Circuit case that first applied it, see

Bernstein v. *N.V. Nederlandsche-Amerikaansche, Stoomvart-Maatschappij*, 210 F.2d 375 (CA2 1954)—under which the courts declined to apply the act of state doctrine if, in the view of the State Department, adjudication of the action would not impair U.S. foreign policy. Again, this did not prove a workable way to handle the issue, and ultimately this Court effectively ended the practice when it unanimously stated in *W.S. Kirkpatrick & Co.* v. *Environmental Tectonics Corp.*, 493 U.S. 400 (1990), that application of the act of state doctrine was a legal question, not subject to variation depending upon the current views of the Executive Branch.[8]

Finally, courts have sought the State Department's views in ATS litigation in the context of deciding whether the political question and comity doctrines should preclude ATS litigation involving the acts of foreign sovereigns. But this practice, too, has not proved consistently workable. Among other reasons, the Department has not always responded to the requests, and in some instances where it has, courts

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[8] The district court in *Kirkpatrick* requested a letter from the Department addressing whether the act of state doctrine applied to a civil suit between two American companies involving the bribery of Nigerian officials. The Legal Adviser (Abraham D. Sofaer) responded, stating the Department's view that judicial inquiry into the purposes behind a foreign sovereign's act did not trigger the doctrine, but the district court disagreed. 493 U.S. at 403. The Third Circuit reversed, noting that the Department's view was "entitled to substantial respect." *Id.* at 403-04. Ultimately, this Court agreed with the Legal Adviser's conclusion as to the scope of the doctrine, and also noted that he had correctly identified the issue as a legal question rather than a policy issue to be addressed by the Executive Branch. *Id.* at 404.

have declined to follow the Department's recommendation, as in the Apartheid Litigation discussed above. And in other cases, the litigation has dragged on so long that the views of the governments in question later changed. See, *e.g.*, *Sarei* v. *Rio Tinto, PLC*, 671 F.3d 736, 756-57 (CA9 2011) (en banc). Here, as in the foreign sovereign immunities context, the result is "determinations [being] made in two different branches, subject to a variety of factors, sometimes including diplomatic considerations," and "governing standards [that are] neither clear nor uniformly applied." *Verlinden*, 461 U.S. at 488.

Clearly, there will remain areas where the State Department's view is critical or even dispositive with respect to an issue in an ongoing litigation—as, for example, where the question is whether the United States recognizes a particular group or entity as the sovereign government of a foreign nation. See *Guaranty Trust Co.* v. *United States*, 304 U.S. 126, 137 (1938) ("What government is to be regarded here as representative of a foreign sovereign state is a political rather than a judicial question, and is to be determined by the political department of the government."); *Jones* v. *United States*, 137 U.S. 202, 212-13 (1890) ("Who is the sovereign, *de jure* or *de facto*, of a territory is not a judicial, but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens and subjects of that government.") But the purely legal question presented to the Court here—the intended territorial reach of a U.S. statute—is not of that nature, and should not be the subject of a rule of deference to the Executive Branch or the State Department.

CONCLUSION

This Court should adhere to the categorical approach it has employed in past cases to address issues of extraterritoriality and should apply that presumption to the ATS. The Court should decline the United States' suggestion that such issues be decided on a case-by-case basis that would depend on the State Department's views based on the "facts and circumstances" of a given case.

Respectfully submitted,

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APPENDIX

APPENDIX

LIST OF AMICI CURIAE[9]

Davis R. Robinson served as Legal Adviser for the U.S. Department of State from 1981 to 1985.

Abraham D. Sofaer served as Legal Adviser for the U.S. Department of State from 1985 to 1990.

Edwin D. Williamson served as the Legal Adviser for the U.S. Department of State from 1990 to 1993.

William H. Taft IV served as Legal Adviser for the U.S. Department of State from 2001 to 2005.

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[9] John B. Bellinger III served as Legal Adviser from 2005 to 2009. He is counsel for a different set of amici curiae in this case in this Court and is submitting a brief for those amici addressing the extraterritoriality issue.